

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

3 UNITED STATES OF AMERICA :

5 | VS : 3:16-CR-175

7 | JAMES BAILEY-SNYDER

10 BEFORE: THE HONORABLE MALACHY E. MANNION
11 PLACE: COURTROOM NO. 3
12 PROCEEDINGS: SENTENCING
13 DATE: MONDAY, NOVEMBER 20, 2017

APPFARANCES.

For the United States:

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1 THE COURT: This is the United States of America
2 against James Bailey-Snyder. Mr. Snyder, the criminal number
3 in your case is 3:CR-16-175. We're here for a final pretrial
4 conference in your case. Now, before we get into that, are you
5 under the influence of any drugs, alcohol, intoxicants or
6 medications that would make you unable to understand the
7 proceedings here today?

8 THE DEFENDANT: No, Your Honor.

9 THE COURT: All right. Now, I note that your counsel
10 filed yesterday a motion to dismiss. I'll wait until I got the
11 government's response to that in terms of deciding it. But I'd
12 be disingenuous after having read the entire document and your
13 brief in support and the lack of either Third Circuit prescient
14 related to the issues that you're referring to and the majority
15 of the circuits determining that that argument does have merit.
16 I -- I can tell you that it's a long hard uphill battle.

17 MR. REISH: I recognize that. That's why I indicated
18 that every circuit that's considered this, Your Honor, found
19 against me. Mr. Bailey-Snyder I'm going to -- I gave him the
20 cites to those different circuit cases. I gave him copies so
21 he can be aware as well.

22 THE COURT: I just -- you know -- I want you to know
23 that I certainly will read everything as I always do that is
24 submitted, but I wanted you to be prepared for the fact that my
25 review of it would make it difficult -- an unlikelihood that

1 you would have a ruling in your favor in all honesty. I will
2 wait until I have seen all of the -- I have read your cases and
3 seen the government's response.

4 MR. REISH: Thank you, Your Honor, for clarifying
5 that. Hopefully there is facts that are to be developed if Mr.
6 Bailey-Snyder has a chance and opportunity to do so, we welcome
7 that. But we will await the Court's decision on the other
8 side.

9 THE COURT: To me it's a purely legal question in all
10 honesty. The question of -- I know it's been decided on a
11 number of occasions before. I know that although I don't
12 remember having written on it myself, I have read about it.
13 It's not unusual at all for somebody who is incarcerated
14 depending on the seriousness of the alleged offense that they
15 had been involved with either administratively it's handled and
16 they are put in the special housing unit pending that or
17 there's a referral being made to -- usually the F.B.I. for what
18 they consider to be more serious potential offenses.

19 And again, the determination of where somebody is
20 actually housed in a federal prison has long been decided by
21 everyone including the Supreme Court not a question that of due
22 process, not a question of choice , that an individual has as
23 to where his housing is inside an institution since it all
24 meets the requirements of -- under the Eighth Amendment even
25 those in special housing units.

1 So, you know, whether there's an civil case there
2 someplace, you know, I don't know. But it's -- my reading of
3 the case law would indicate it's fairly unlikely that you're
4 going get a positive determination. The reason I mention that
5 is that your trial is scheduled for December 11th. That's when
6 we will begin. So we will decide it before that.

7 The government -- your response is due two weeks from
8 yesterday I guess. So I'd appreciate it if you get your
9 response in in that period of time or before so we can resolve
10 that and move on. So let's talk a little about the trial here
11 at the final pretrial conference.

12 We will begin December 11th at 9:30 in the morning.
13 The jurors will be here before that. They have to go through
14 their orientation and view a video and gather certain
15 information. We will begin shortly usually around 9:30. We
16 will begin with jury selection. And as a criminal case, we
17 need to pick 12 jurors, and we will pick two alternate jurors
18 is usually the process we use. The government has six
19 peremptory challenges. The defense gets ten peremptory
20 challenges.

21 Because we will pick two alternates, each side will
22 get one peremptory challenge related to the two potential
23 alternates. Now, that being said, my practice has generally
24 been to offer counsel the opportunity -- since technically
25 under the rules the regular jury is selected first at which

1 time you would use your ten for the defense and your six for
2 the government peremptory challenges, and then separately we
3 will pick the alternates which would be one preemtory
4 challenge for each of you because there's two potential
5 alternates being selected.

6 I have offered counsel the opportunity in the past if
7 they want to combine those so that the defense would then
8 receive 11 peremptory challenges and the government would
9 receive seven peremptory challenges. And the first -- the 14
10 jurors that are left -- the first 14 after you've taken all of
11 your challenges and, of course, changes for cause, the first 12
12 would become the actual sitting jury and members 13 and 14
13 would become the alternates.

14 I offer that because sometimes it's strategically
15 more advantageous for counsel to be able to use their
16 additional peremptory challenge anywhere they want rather than
17 use it on an alternate. In my experience over the last 15, 16
18 years, I'm trying to remember if we ever used an alternate.
19 And so the result is that it may be more beneficial for you to
20 be able to have that extra peremptory challenge for the jury.
21 But it's up to you. What are your thoughts, gentlemen, on
22 that?

23 MR. REISH: I have usually combined them, I believe,
24 Your Honor. The last -- I think -- the last trial I had I did.

25 MR. HINKLEY: No objection to that, Your Honor.

1 THE COURT: We will do it that way. I think that
2 gives both sides an added benefit if that's the right word. We
3 will go directly from jury selection into the trial, of course,
4 with a break for everyone to be able to get themselves set. We
5 will commence each day probably around 9:30. Normally, I look
6 to see where jurors are actually from so we can make a
7 determination we can begin earlier. But because the area from
8 which we draw has people coming from the New York State boarder
9 or as far south and east as the eastern part of Schuylkill
10 County, it can be a two and a half hour ride for people to get
11 here. And so I normally -- after you selected your jurors I
12 will take a look and see how far they're coming from. And if
13 everybody happens to be close we can start at 8:30 each day.
14 If they happen to be longer, which is at least one or two of
15 them usually in the case, we may start at 9 or most likely 9:30
16 each day.

17 We will go until 5:00 or thereabouts. And so I ask
18 that the parties have whatever witnesses they intend to call
19 prepared and ready. And when the government is going to be
20 completing your case, please make sure that the defense is
21 aware of that in advance so if there are any witnesses the
22 defense intends to call they'll be able to continue right in
23 and present their case so you won't have any breaks in time or
24 having to wait until the next day to begin the case. The rules
25 of the courtroom are as you both know -- there are no rules to

1 the extent that your movement is unrestricted. You can ask
2 questions sitting, standing, running, jumping, laying --
3 whatever makes you comfortable. If you want to approach a
4 witness, you don't have to ask. If the other side thinks
5 you're badgering a witness, they'll make an objection and I
6 will rule on the objection.

7 We will break for lunch around noon. Again, there's
8 no exact set time. We will try to pick times that's logical
9 sense in the testimony that's being presented. I always like
10 to try to complete witnesses if at all possible before breaks.
11 But if not, we will break in what appears to be a rational or
12 logical time. If you need a break at any time for any reason,
13 just let me know, and we'll take a break during the course of
14 the case.

15 I would ask that you submit your requested points for
16 charge by -- the 11th is a Monday I assume. Submit your
17 request to charge by the 7th, which is the Thursday before
18 that, I do ask that a couple things related to requested
19 charge, first is speak with each other. You know, most of
20 these request to charge are going to be standard jury
21 instructions.

22 For the most part , if not completely you ought to be
23 in agreement as to what the charge is. As you both know, I use
24 the standard jury instructions approved by the Third Circuit.
25 If for some reason there was not a standard jury instruction

1 approved by the Third Circuit, then we go to other either
2 circuits or federal jury instructions. I virtually only use
3 standard jury instructions unless there was nothing on a
4 particular issue that needed to be charged. And I don't
5 generally charge any snippets from cases or case law. I like
6 the tried and true jury instructions so we avoid any kind of
7 misinterpretation or improper language in terms of what could
8 be charged and because if you hunt enough you can find almost
9 anything you want in different judge's opinions. So that
10 really is not much weight in my mind.

11 MR. HINKLEY: Your Honor, in regards to those
12 charges, I assume as you said you're just going to be using
13 standard Third Circuit for the particular crime he's charged
14 with, and I am not sure there's any specific instructions I can
15 think of that would be applicable in this case. The defense
16 may have something.

17 THE COURT: Yeah, I don't know. That would depend
18 upon what comes out. So what I would like to you do is just
19 both you submit hopefully joint charges. Sometimes even on a
20 standard jury instruction there are kind of fill in the blanks
21 depending on the exact circumstances, and sometimes counsel
22 disagrees on the fill in the blank part of it, or there might
23 be multiple paragraphs of which one side thinks only four of
24 them are applicable and the other side thinks six of them are
25 applicable. So, you know, but hopefully you'll be able to

1 agree on the charge that's used in the case. And so that would
2 make certainly everybody's life an awful lot easier and, you
3 know, more appropriately move the case along in a manner that
4 seems to make sense.

5 Although I'm asking you to submit your request to
6 charge by the 7th, that's not foreclosing you from requesting
7 additional charges or requesting to delete a charge that you
8 have submitted before the jury is actually charged. What we
9 normally do is right before the jury is going to be charged --
10 usually the evening before I'll meet with counsel, and we will
11 have a charge conference to see whether or not there's been any
12 changes that we need to take anything out or whether there's
13 any additions somebody requested.

14 The mere fact I am asking to you submit a charge on
15 December 7th. It doesn't mean you are somehow bound or
16 foreclosed from submitting other charges if they become
17 appropriate during the trial. It's really for us to be able to
18 get a heads up and to try to prepare our charge in advance so
19 we don't hold the jury up at the end of the case while we're
20 preparing the charge. You do have to agree upon a proposed
21 verdict slip. So the parties must agree on a proposed verdict
22 slip in the case. That should not be a difficult process. But
23 it is a requirement of mine that you agree upon your verdict
24 slip in the case.

25 If either side wishes to use the JERS system,

1 electronic system for evidence for the jurors, you need to
2 submit your exhibits in P. D. F. format on or before December
3 -- close of business December 7th as well. And again that
4 doesn't foreclose you because you have submitted your exhibits.
5 If it turns out there's something that comes up in another
6 exhibit, you will be able to do that.

7 But if you wish to use the electronic system for the
8 jury, we receive all exhibits by electronic format. Using the
9 television that's in there, we need to be able to upload all of
10 those exhibits. And then as they are admitted, they'd be
11 released so the jury would be able to view them during their
12 deliberations. So if you want to do it the standard old
13 fashioned way, you're welcome to do that or you can do
14 everything on paper. It's completely up to counsel, all right.
15 What else?

16 MR. HINKLEY: Good question on voir dire, do you
17 allow counsel to --

18 THE COURT: Yeah, you can actively participate in
19 voir dire. I will ask what I will call the standard Third
20 Circuit, you know, questions. But I expect that counsel will
21 actively, you know, participate in jury selection, and I will
22 give you the opportunity to ask questions that you want to ask.
23 I do ask you not to try your case in jury selection. It's not
24 a closing argument. But I do understand that in order to get a
25 fair jury that you may have to ask questions that relate to the

1 circumstances, and that's completely appropriate. So yes, you
2 will be able to participate in your jury selection. If anyone
3 intends to use any demonstrative evidence during their opening
4 statement since nothing has been actually admitted into
5 evidence yet, I generally don't have a problem with that either
6 as long as it's something that's reasonably likely to be
7 admitted into evidence and that counsel has shown it to the
8 other side beforehand so that each side has an opportunity
9 should they choose to object to it.

10 So I mean, I don't see that often. But occasionally
11 somebody wants to use some sort of demonstrative during opening
12 statement, and I don't have a problem with that except I do
13 want counsel to be aware of it. We can discuss any objections
14 to it beforehand so it's not a surprise. Government will go
15 first obviously in their opening. Defense second. Closing
16 government first, defense second, government has rebuttal
17 closing. What else?

18 MR. REISH: Your Honor, with regard to any Jencks or
19 transcripts of grand jury testimony from government witnesses,
20 would there be some type of early disclosure? There usually
21 would be. I assume there would be by the government. I never
22 felt the need to have it ordered, but I don't know there's
23 anything.

24 THE COURT: Well, when is it you intend to turn over
25 your Jencks material?

1 MR. HINKLEY: Generally we do it Friday before jury
2 selection. I don't want to state on the record that's what is
3 going to happen. I intend to do that, but I don't think we are
4 actually required until we have called the particular witness.
5 But generally as a matter of course we do it Friday before.

6 THE COURT: Technically under rule 3500 the time is
7 they have to turn it over is after the witness has testified,
8 and I never seen that happen. It's done usually before that.
9 And so the weekend before is -- Friday before is again in my
10 experience a normal time. But perhaps counsel and you can talk
11 about whether or not there's, you know, any earlier time that
12 can be given.

13 MR. REISH: I don't think it would be a lengthy -- I
14 don't think a lot of material. Seems like there's a few
15 witnesses so that would be appropriate for this type of case.

16 THE COURT: All right. Well, I will leave that to
17 counsel in terms of -- it's clear to me that 3500 sets forth
18 the dates, and certainly the government must comply with that.
19 If they are willing to comply with earlier times, then I would
20 encourage them to do that. But I guess I will let you two
21 discuss that. What else?

22 MR. REISH: There a few possible discovery items I
23 brought up to the government. They are going to comply with
24 the request. It was a supplemental request for Giglio
25 materials. I am confident they can do so. I am looking for

1 performance evaluations and on-the-job evaluations from some of
2 the C. O.s. I believe there's a proper channel they can go
3 through to look for those and any other things that might be
4 relevant, so I trust they'll do that. That was really the only
5 outstanding issue that I've had with the government that just
6 came up recently.

7 THE COURT: Are there anyone -- are there any motions
8 in limine that we're anticipating or expecting at this stage?

9 MR. HINKLEY: The defendant does have a criminal
10 history as the Court is aware. And in addition to the crime
11 for which he's currently serving a federal sentence, he has a
12 conviction which is crimen falsi also within ten years. I may
13 file in limine motions requesting the opportunity to use those
14 as crimen falsi as prior convictions if the defendant
15 testifies.

16 THE COURT: Well, you can certainly do that. But the
17 rules allow for use of crimen falsi testimony within ten years.
18 So I am not sure that you need actually a motion in limine from
19 the Court. Under the rules that's allowed. Normally I think
20 the side that would be arguing that you shouldn't be allowed to
21 use that since the rules says you can use that would be the
22 other side if it turns out that they were thinking that was
23 appropriate in the case or perhaps, you know, are not as
24 concerned about that in light of where the defendant is
25 presently living and housed and the fact the jury will know --

1 but I don't know what the answer to that question is. I'm not
2 so sure you need a motion affirmatively requesting things that
3 you would be entitled to.

4 Now, if you didn't think you were going to be
5 entitled it or it's a problem, perhaps you would do it that
6 way. If there are any motions in limine, they should be filed
7 by January 4th -- is that the --

8 MS. SEMPA: I think they were technically due today.

9 THE COURT: They were already scheduled to be filed.

10 MS. SEMPA: Correct, today.

11 THE COURT: Right, okay. Then that's right. My
12 scheduling order probably had already indicated those. So I
13 would assume that they're done then. What else?

14 MR. REISH: I assume the government is -- I haven't
15 received notice that they will be bringing in any conspiracy
16 convictions, but that might be outstanding if he does take the
17 stand and they want to bring out the drug conspiracy
18 conviction, that might be a 609 issue. I can talk with
19 attorney Hinkley about that.

20 THE COURT: Yeah, any --

21 MR. REISH: That would require a balancing test.

22 THE COURT: Normal evidentiary determinations, we can
23 just -- we will make at trial. You know, there are always --
24 whatever the evidentiary rulings are depend upon what evidence
25 is actually being presented which often we don't know. I don't

1 know if Mr. Bailey-Snyder intends to testify or not testify,
2 and that, of course, will change what we have to worry about or
3 not worry about.

4 My guess is that just like Mr. Hinkley is going to
5 hold on to his Jencks material for a while, my guess is Mr.
6 Reish isn't going to inform us of the determination of whether
7 or not the defendant will testify quite yet either. That's all
8 part of -- we will make rulings as it becomes appropriate and
9 the evidence is presented. So that doesn't concern me too much
10 at this stage. What else?

11 MR. HINKLEY: I can't think of anything, Your Honor.

12 THE COURT: Okay.

13 MR. REISH: I have a couple notes if I can just
14 double check.

15 THE COURT: Sure. Absolutely, please.

16 MR. REISH: Your Honor, I'll clarify to make sure the
17 record is clear. I misspoke. His prior wasn't conspiracy for
18 drug delivery, it was actual drug delivery. It might have some
19 relevance in regard to 609, but I did misspeak.

20 THE COURT: Okay.

21 MR. REISH: Nothing further.

22 THE COURT: Anything else from the government?

23 MR. HINKLEY: Nothing.

24 THE COURT: I hope you have a good Thanksgiving. We
25 will see you on the 11th. Thank you.

1 MR. HINKLEY: Thank you, Your Honor.

2 MR. REISH: Thank you, Your Honor.

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Official Court Reporter

16 | REPORTED BY:

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